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Pursuant to the Board's Rules and Regulations, Respondent Raymond Interior Systems ("Raymond") submits its Reply Brief to the Answering Brief of Counsel for the General Counsel ("GC Brief") and Answering Brief of Painters Union ("Painters' Brief").

I. COUNSEL FOR THE GENERAL COUNSEL'S REPRESENTATION REGARDING ALLEGEDLY UNCHALLENGED FINDINGS.

In his Answering Brief, the General Counsel lists a number of alleged unchallenged findings. See GC Brief, pages 3-7. The General Counsel's list contains inaccuracies that will not be detailed herein. However, a comparison of the exceptions filed by Raymond with the alleged unchallenged findings listed by the General Counsel will reveal the inaccuracies of the General Counsel's representations.

II. THE PARTIES HAD AN 8(F) AGREEMENT ON OCTOBER 1, 2006 UPON EXPIRATION OF THE PAINTER'S AGREEMENT.

Upon expiration of the Painters agreement on September 30, 2006, Raymond and the Carpenters covered the drywall finishing work and the drywall finishing employees performing such work by the 2006-2010 Carpenters Agreement. Coverage was extended by the parties by virtue of Section 7(g) of that agreement or by the parties separate Confidential Settlement Agreement. (Resp. Er. Ex. 4, page 4, Resp. Er. Ex. 5, page 1)

A. Application of the 2006-2010 Carpenters Agreement to Raymond's drywall finishing employees created an 8(f) agreement as to those employees.

The General Counsel and Painters, like the ALJ, assume that what occurred upon expiration of the Painters agreement on September 30, 2006, was a <u>merger</u> of the drywall framing and hanging employees and drywall finishing employees into one unit. The merger of these bargaining units is a necessary predicate for the ALJ's finding of an unlawful accretion. Aside from the fact that the General Counsel never alleged or pursued a violation based on what occurred on October 1, 2006, there is no evidence that Raymond merged (or intended to merge) these two separate bargaining units into one bargaining unit prior to October 2, 2006. ¹ It was

¹ The legal arguments of Raymond's attorney in Raymond's submission to the Region as to why he believed the October 2 meeting was privileged (see G.C. Ex. 4) do not provide factual support or evidentiary proof for the ALJ's finding that an accretion occurred herein.

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only <u>after</u> Carpenters representatives presented authorization cards on October 2 from the drywall finishing employees that Raymond recognized the Carpenters in one bargaining unit comprised of the drywall framing and hanging and the drywall finishing employees.

What the evidence does show herein is that upon expiration of the Painters agreement, Raymond applied the existing 2006-2010 Carpenters agreement to the drywall finishing employees unit formerly represented by the Painters. Lacking any evidence that the drywall finishing employees were merged into one unit with the drywall framing and hanging employees prior to October 2, the General Counsel and Painters assert that unlawful accretion occurred because an employer cannot have an agreement that covers one bargaining unit on a Section 9(a) basis and another unit on a Section 8(f) basis. In doing so, they rely on accretion cases <u>outside</u> the construction industry in which an employer applies a 9(a) agreement to a historically separate bargaining unit.

But, the analogy to non-construction industry accretion cases is an erroneous comparison. In non-construction industry cases, a 9(a) agreement cannot be lawfully applied to a historically separate bargaining unit without evidence of majority support in that unit. That is not the case in the construction industry. Under <u>Deklewa</u>, the Board presumes that parties in the construction industry intend their relationship to be an 8(f) relationship. <u>John Deklwewa & Sons</u>, 282 NLRB 1375, 1385 fn. 41 (1987). In utilizing an accretion analysis based on non-construction industry cases, the General Counsel, Painters (and the ALJ) ignore this 8(f) presumption and instead presume that application of the Carpenters agreement to the separate drywall finishing employees was done on a 9(a) basis. Obviously, such presumption and analysis runs counter to established Board precedent in the construction industry.

The General Counsel, Painters and the ALJ also ignore the Board's decision in <u>Comtel</u> Systems Technology, Inc., 305 NLRB 287 (1991). <u>Comtel</u> implicitly suggests that in the construction industry a 9(a) agreement applied to a separate bargaining unit is applied on an 8(f) basis. The General Counsel and the Painters (as well as the ALJ) obviously disagree and attempt to distinguish <u>Comtel</u> from the instant case. However, their attempt to distinguish <u>Comtel</u> on the basis that it involved a separate employer, and not the same employer as herein, is a distinction

without a difference. The critical factor in Comtel was not the identity of the employer, but the fact that the agreement was being applied to a separate bargaining unit. The Board's decision in Comtel fully supports the position of Raymond herein that an agreement can be a 9(a) vis-à-vis one bargaining unit and 8(f) with respect to another unit.

The fact that the 2006-2010 Carpenters Agreement contains Staunton Fuel language, while not irrelevant, is not determinative. The ALJ relied on such language to find that Raymond and the Carpenters intended to establish a 9(a) relationship as to the drywall finishing employees in applying the Carpenters Agreement to such employees on October 1, 2006. The General Counsel and the Painters support this finding by the ALJ. But, the General Counsel and Painters (like the ALJ) ignore the Board's refusal in Madison Industries, Inc., 349 NLRB 1306, 1309 fn. 13 (2007) to "pass on whether unambiguous language alone is sufficient to establish Sec. 9 status." Moreover, there is no "positive evidence" that Raymond and the Carpenters intended to create a 9(a) relationship as to the drywall finishing employees when they covered these employees by the Carpenters Agreement on October 1. Before such an intention can be found, the Board requires "positive evidence that the union sought and the employer extended recognition to a union as the 9(a) representative of its employees before concluding that the relationship between the parties is 9(a) and not 8(f)." See J & R Tile, 291 NLRB 1034, 1036 (1988). While there may be evidence that Carpenters representative Gordon Hubel would have argued that the drywall finishing employees were part of an overall 9(a) unit, there is no evidence that, at any time prior to October 2, 2006, the Carpenters demanded recognition based on majority status and that Raymond granted Section 9(a) status to the Carpenter as to its drywall finishing employees.

The parties Confidential Settlement Agreement created an 8(f) agreement as В. to the drywall finishing employees.

Aside from the foregoing, the fact remains that the parties entered into a separate Confidential Settlement Agreement which created an 8(f) agreement as to Raymond's drywall finishing employees.

The Confidential Settlement Agreement in pertinent part states:

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"2. At the expiration of Raymond's agreement with Painters District Council No. 36 on September 30, 2006, Raymond agrees that to the fullest extent permitted by law it will apply the Southern California Drywall/Lathing Agreement to its drywall finishing work and employees."

See ALJD 8:5-20 (emphasis added).

Here, the ALJ misread the phrase "to the fullest extent permitted by law" as signifying the parties' intent to establish a Section 9(a) bargaining relationship covering the drywall finishing employees." For the ALJ to have inferred that the parties intended to create an unlawful agreement (by language stating an intention to enter into a lawful agreement) is a complete misreading and gross distortion of this phrase. The ALJ also rejected the Confidential Settlement Agreement as creating an 8(f) relationship because the ALJ found "that the parties never discussed the confidential settlement agreement in terms of creating a Section 8(f) bargaining relationship." (ALJD 8:49-50) Clearly, such analysis reverses the Board's normal 8(f) presumption by presuming that the Confidential Settlement Agreement was intended to create a 9(a) relationship. The ALJ's finding in this regard contravenes established Board law that the burden of proof is on the party contending that a 9(a) relationship exists, not on the party asserting an 8(f) relationship. Casale Industries, 311 NLRB 951, 952 (1993)

Aside from the foregoing, the ALJ erroneously rejected the Confidential Settlement Agreement as constituting a collective bargaining agreement. See ALJD 29:7-8. The ALJ's reasoning that the Settlement Agreement did not describe a bargaining unit or contain terms and conditions of employment is plainly wrong. While the term "bargaining unit" is not mentioned in the Settlement Agreement, it expressly identifies the drywall finishing employees as the employees to be covered by the Southern California Drywall/Lathing Agreement. This is sufficient to describe the "bargaining unit." See, e.g., Pilot Freight Carriers, Inc., 223 NLRB 286, 304 (1976); The Exchange Bank, 264 NLRB 822 (1982) (reference to "nonexempt employees" sufficient to describe bargaining unit). The Settlement Agreement also contains terms and conditions of employment because it incorporated the terms and conditions of the Southern California Drywall/Lathing Agreement to the drywall finishing employees bargaining unit. Given the foregoing, the Confidential Settlement Agreement created an enforceable 8(f)

agreement vis-à-vis the drywall finishing employees upon expiration of the Painters Agreement. See, e.g., Carthage Sheet Metal Co., 286 NLRB 1249, 1255 (1987); Local Union No. 530 (Cape Construction Company, Inc.), 178 NLRB 162, 164 (1969) (Parties' oral agreement that terms of mainline pipeline collective bargaining agreement "would be enforced on this particular job" and construction project would be governed by the terms of the agreement was "legally sufficient" to make mainline contract operative as a collective bargaining agreement between parties.)

The General Counsel contends that the Confidential Settlement Agreement was <u>not</u> a collective bargaining agreement because it was intended to be kept confidential from employees. <u>See</u> GC Brief, page 28. This contention misses the point because Paragraph 2 of the Settlement Agreement did establish the parties' intent to apply a collective bargaining agreement to the drywall finishing employees upon expiration of the Painters agreement on September 30, 2006, and there is no evidence that the terms of such collective bargaining agreement applicable to these employees were intended to be kept secret from them. In fact, the evidence herein establishes that these employees were so informed at the October 2, 2006 meeting.

The Painters contend that the ALJ properly found that the Confidential Settlement
Agreement was unlawful. See Painters' Brief, pages 10-12. However, under well-established
Board precedent, the ALJ could not base a violation of the Act on the argument or alternative
theories of the Painters. See e.g., ATS Acquisition Corp., 321 NLRB 712 (1996). Moreover, no
violation can be shown since there were no overlapping collective bargaining agreements. Here,
Raymond did not extend recognition to the Carpenters as the collective bargaining representative
or apply the terms and conditions of any Carpenters agreement during the term of the Painters
Agreement. See Resp. Er. Ex. 4 (Southern California Drywall/Lathing Agreement would apply
to the drywall finishing employees "[a]t the expiration of Raymond's agreement with Painters
District Council No. 36 on September 30, 2006."(emphasis added)). As a result, Oil Field
Maintenance Co., Inc., 142 NLRB 1384, 1386 (1963) and Builders, Woodworkers & Millwrights,
Local Union No. 1 (Glenn Falls Contractors Association), 341 NLRB 448 (2004), cited by the
Painters, are distinguishable as violations were found therein because they involved overlapping
collective bargaining agreements. Accordingly, no violation can be found based on the

Confidential Settlement Agreement. See Acme Tile & Terrazzo Co., 306 NLRB 479, 480 (1992) (Addendum signed by employer members binding them to an 8(f) Bricklayers multi-employer association agreement that was signed during the term of the association's 8(f) Carpenters agreement, but which became effective after expiration of the 8(f) Carpenters agreement was a lawful 8(f) agreement.)

Based on the foregoing, a valid 8(f) agreement covering the drywall finishing employees existed as a result of application of Section 7(g) of the 2006-2010 Carpenters Agreement or as a result of the Confidential Settlement Agreement.

III. THE ALJ ERRED IN FINDING THAT RAYMOND VIOLATED SECTIONS 8(A)(1), (2) AND (3) BASED ON ALLEGED STATEMENTS MADE BY TRAVIS WINSOR AND HECTOR ZORRERO AT THE OCTOBER 2, 2006 MEETING.

The ALJ found that Raymond violated Sections 8(a)(1), (2) and (3) by rendering unlawful assistance and support to the Carpenters on October 2, 2006. The ALJ based these findings solely upon statements attributed to Travis Winsor and Hector Zorrero. (ALJD 31:18-20)

The ALJ's findings are based upon his crediting of selected testimony from Mr. Ramos, Ms.

Pineda and Mr. Alvarez, the ALJ found that on October 2, 2006 Raymond violated Sections 8(a)(1), (2) and (3).

Because the ALJ's findings are not supported by a preponderance of the evidence (as noted in Raymond's exceptions brief), the ALJ erred in finding violations of the Act based on the alleged statements of Travis Winsor and Hector Zorrero. Like the ALJ, the General Counsel and Painters in their briefs fail to address the material inconsistencies and contradictions in the testimonies of Mr. Ramos, Ms. Pineda and Mr. Alvarez.

The ALJ credited Jose Ramos' testimony because he was the most "most trustworthy" and he "clearly exhibited his comprehension of the meaning, gravity, and consequences of the oath." (ALJD 31:21-25) However, Mr. Ramos understood "very little" English, and testified he listened in English, but used the headsets to hear in Spanish. (Tr. 284:2-15) Given his limited English-speaking ability, the issue in evaluating Mr. Ramos' testimony was not, whether he was trustworthy or understood the oath (as relied upon by the ALJ), but whether Mr. Ramos understood what was said at the October 2 meeting. Given the numerous inconsistencies in Mr.

Ramos' testimony (as noted in Raymond's exceptions brief), it is apparent that he did not comprehend what was actually said by Mr. Winsor. Moreover, to the extent the ALJ gave credence to Mr. Ramos' testimony because Mr. Ramos did not report to work the next day (see ALJD 31:25-28), such conduct does not make it more probable that Mr. Winsor made the statements attributed to him. It is equally probable that as a result of Mr. Ramos' preference for the Painters, he decided he did not want to continue working for Raymond if the drywall finishing employees were going to be represented by the Carpenters.

The ALJ credited Ms. Pineda's testimony because she corroborated Mr. Ramos and Mr. Ramos corroborated her. (ALJD 31:28 to 32:2) However, as more fully detailed in Raymond's exceptions brief, Ms. Pineda's testimony establishes more inconsistency than corroboration; Ms. Pineda was inattentive during the meeting at the Training Center and admitted that her memory of what happened was "not good" (Tr. 175:24-25); Ms. Pineda conceded that Mr. Winsor stated that "employees had plenty of time to think about it" (Tr. 183:18 to 184:20); and Ms. Pineda was a biased witness who was clearly unhappy with Raymond's decision and motivated to testify favorably on behalf of the Painters charges in this matter.

Like Mr. Ramos, Mr. Alvarez' testimony was suspect given his limited understanding of English. Mr. Alvarez testified that Mr. Zorrero spoke in English and he listened to Mr. Zorrero in English. (Tr. 200:7-11, 208:20-22) Given his limited English-speaking capability, the statements attributed to Mr. Zorrero by Mr. Alvarez were very likely misunderstood by Mr. Alvarez. That such was the case is clearly evidenced by the fact that Mr. Alvarez' testimony regarding Mr. Zorrero's alleged statement was not supported by the testimony of any other witness.

While the ALJ rejected Travis Winsor's testimony, (as amply detailed in Raymond's exceptions brief), Mr. Winsor credibly testified that in response to question(s) about whether employees had to make a decision "today" or "now" on joining the Carpenters, he responded by saying "no," they did not have to make a decision today and could take their time. Additionally, Mr. Winsor credibly denied making the statements attributed to him by the General Counsel's witnesses and his denials were corroborated by Hector Zorrero as well as Carpenters representatives Gordon Hubel, David Cordero, and Pedro Loera.

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Travis Winsor is a licensed attorney who prepared for the meeting by creating the Power Point presentation used in the Training Center meeting as well as the documents Raymond distributed at this meeting. It defies credulity that, as an experienced attorney with labor experience who had prepared for the October 2 meeting, and was knowledgeable about the requirements of the union security provision in the Carpenters agreement, Mr. Winsor would have made the alleged unlawful statements attributed to him by the General Counsel's witnesses. And, the uncontroverted fact that no drywall finishing employee was terminated for not joining the Carpenters after the October 2 meeting (see Tr. 444:8-24) strongly suggests that Mr. Winsor never made these statements.

As noted in Raymond's exceptions brief, Mr. Alvarez was the only witness who claimed that in response to a question for more time to think about signing with the Carpenters, Hector Zorrero allegedly responded by saying, "No. That there was no time, that it was either at that moment or ..." No other witness supported or corroborated Mr. Alvarez's testimony. Mr. Zorrero, on the other hand, credibly denied making any such statement and, unlike Mr. Alvarez, Mr. Zorrero's denials are corroborated by Mr. Winsor's testimony as well as the testimony of Carpenters representatives Pedro Loera, David Cordero, and Gordon Hubel.

Based upon the above, the preponderance of the evidence does not support the ALJ's findings rejecting Travis Winsor's and Hector Zorrero's denials as to the alleged unlawful statements attributed to them at the October 2 meeting. While the ALJ was critical of Mr. Winsor's and Mr. Zorrero's testimony, more inconsistencies existed among the testimonies of General Counsel's witnesses. Yet, despite the numerous and material inconsistencies in the testimony of the General Counsel's witnesses, and without any attempt to explain them away, the ALJ erroneously credited their testimony and justified his doing so with boiler-plate language that he believed them to be "trustworthy" and "honest." Warshwsky v. NLRB, 182 F.3d 948 (D.C. Cir. 1999) (error for the Board to focus on evidentiary fragments and ignore the aggregate weight of the evidence). In their briefs, the General Counsel and Painters duplicate the ALJ's erroneous findings by parroting the ALJ's demeanor characterizations of the General Counsel's witnesses, selectively quoting from their testimony, and ignoring material testimonial inconsistencies or

describing them as "minor testimony variances." <u>See</u> Painters Brief, pages 13-15; GC Brief, page 33.

Because the preponderance of the evidence did not support the ALJ's findings that Travis Winsor and Hector Zorrero made statements violative of Sections 8(a)(1), (2) and (3) at the October 2, 2006, meeting (as alleged in the Complaint), the ALJ's findings that Raymond violated these provisions of the Act were in error.

IV. RAYMOND'S DID NOT VIOLATE SECTIONS 8(A)(1) AND (2) BY ITS RECOGNITION OF THE CARPENTERS VIA THE "RECOGNITION AGREEMENT" ON OCTOBER 2, 2006 BECAUSE THE CARPENTERS' MAJORITY SUPPORT WAS NEITHER TAINTED NOR COERCED.

Here, the ALJ found violations of 8(a)(1) and (2) because of Raymond's "unlawful assistance sufficient to taint the latter's asserted showing by authorization cards, of majority support." (ALJD 34:12-14) The sole basis supporting this finding is the ALJ's finding that Travis Winsor and Hector Zorrero made unlawful statements during the October 2, 2006 meeting. See ALJD 34:8-12.

Even assuming <u>arguendo</u> such statements were made they do not vitiate the authorization cards collected by the Carpenters from the drywall finishing employees. It is undisputed that neither Mr. Winsor nor Mr. Zorrero solicited or directed employees to sign <u>authorization</u> cards on behalf of the Carpenters and the undisputed evidence establishes that both were unaware that the Carpenters were soliciting authorization cards on October 2 from the employees. Thus, Mr. Winsor's and Mr. Zorrero's alleged 8(a)(2) statements could not have been remotely directed to the signing of authorization cards. Even the General Counsel's Complaint conceded this point by attributing Mr. Winsor's and Mr. Zorrero's statements to the signing of <u>union membership</u> cards. See G.C. Ex. 1, Complaint, ¶ 18(d))

Because the alleged statements of Mr. Winsor and Mr. Zorrero, even if made, were directed to the employees' signing of union membership cards, the evidence herein failed to establish an 8(a)(2) violation as to the authorization cards and, accordingly, failed to establish that the authorization cards collected by the Carpenters from the drywall finishing employees were invalid or coerced. The ALJ's finding is based on his unwarranted and unsupported belief "that employees, who were instructed to complete the membership application, undoubtedly completed

and executed every form on the large document without regard to the difference between them."

(ALJD 33:38-42) Yet, none of the witnesses presented by the General Counsel testified in support of the belief on the part of the ALJ despite extensive questioning by counsel of all parties and the ALJ and no witness testified that they signed a union authorization card because of the statements of Mr. Winsor or Mr. Zorrero. The General Counsel had the burden of proof to establish that the Carpenters' majority support was tainted or coerced and, except for the ALJ's speculation on this crucial issue, did not carry his burden. The ALJ's speculation is not evidence and cannot support his finding. See, e.g., TRW, Inc. v. NLRB, 606 F.2d 570, 573 (5th Cir. 1979) (Suspicion, conjecture and theoretical speculation register no weight on the substantial evidence scale.)

V. THE ALJ'S RECOMMENDED REMEDY THAT RAYMOND NOT RECOGNIZE THE CARPENTERS ABSENT A BOARD ELECTION IS ERRONEOUS.

As detailed in its exceptions brief, the ALJ's recommended remedy that Raymond not recognize the Carpenters absent a Board election is unwarranted. With respect to <u>Garner/Morrison, LLC</u>, 353 NLRB No. 78, cited by the General Counsel, it is factually distinguishable and a Petition for Review of the Board's decision has been filed with the United States Court of Appeals for the District of Columbia.

VI. <u>CONCLUSION</u>

For the foregoing reasons, and those set forth in its exceptions brief, Raymond Interior Systems requests that the Board sustain its exceptions to the Decision of Administrative Law Judge Burton Litvak and modify his findings, conclusions of law, recommended Remedy, recommended Order, and recommended Notices, accordingly.

DATED: February 24, 2009

Respectfully submitted,

HILL, FARRER & BURRILL LLP James A. Bowles, Esq. Richard S. Zuniga, Esq.

By: Richard & Zimg Richard S. Zuniga

Attorneys for Respondent
RAYMOND INTERIOR SYSTEMS

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CERTIFICATE OF SERVICE

I, Richard S. Zuniga, declare as follows:

1. I hereby certify that on February 24, 2009, I filed **Respondent Raymond Interior Systems' Reply Brief to Answering Brief of Counsel for the General Counsel and Answering Brief of Painters Union** in Cases 21-CA-37649 and 21-CB-14259, via E-Filing, and I caused the original and eight (8) copies of the foregoing document to be placed in a sealed envelope and sent overnight delivery via Federal Express as follows:

Lester A. Heltzer, Executive Secretary National Labor Relations Board 1099 – 14th Street N.W. Washington, D.C. 20570 Tel: (202) 273-1067

2. I hereby certify that on February 24, 2009, I caused to be served true copies of Respondent Raymond Interior Systems' Reply Brief to Answering Brief of Counsel for the General Counsel and Answering Brief of Painters Union in Cases 21-CA-37649 and 21-CB-14259, by first-class U.S. Mail and by E-Mail on the following parties:

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I hereby certify that the foregoing is true and correct. Executed this 24th day of February 2009, at Los Angeles, California.

Richard S. Zuniga
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